

IDAPA 58 - DEPARTMENT OF ENVIRONMENTAL QUALITY

58.01.23 - RULES OF ADMINISTRATIVE PROCEDURE BEFORE THE BOARD OF ENVIRONMENTAL QUALITY

DOCKET NO. 58-0123-0901

NOTICE OF RULEMAKING - PROPOSED RULEMAKING

AUTHORITY: In compliance with Section 67-5221(1), Idaho Code, notice is hereby given that this agency has initiated proposed rulemaking. This action is authorized by Sections 39-105, 39-107 and 67-5206, Idaho Code.

PUBLIC HEARING SCHEDULE: No hearings have been scheduled. Pursuant to Section 67-5222(2), Idaho Code, a public hearing will be held if requested in writing by twenty-five (25) persons, a political subdivision, or an agency.

Written requests for a hearing must be received by the undersigned on or before December 16, 2009. If no such written request is received, a public hearing will not be held.

DESCRIPTIVE SUMMARY: This rulemaking has been initiated to make revisions to the Rules of Administrative Procedure Before the Board of Environmental Quality for clarification purposes and for consistency with the Idaho Administrative Procedure Act (APA) and the Environmental Protection and Health Act.

The proposed rule includes revisions to the following sections:

- (1) Section 052. Revisions made for consistency with Section 67-5273, Idaho Code.
- (2) Section 303. Revisions made to provide flexibility that would allow potential parties to enter into a tolling agreement.
- (3) Sections 353 through 355. Revisions made for clarity and to provide a time limit within which an intervenor, once granted permission to intervene, may file its response to the petition for contested case.
- (4) Section 720. Revisions made for clarity, to streamline the process, for consistency with Section 730, and for consistency with Sections 67-5244 and 67-5273, Idaho Code.
- (5) Section 730. Revisions made for clarity, to streamline the process, for consistency with Section 720, and for consistency with Sections 67-5245 and 67-5273, Idaho Code. Revisions made to this section remove the Board's discretion to hear petitions for review of preliminary orders. The APA does not provide discretion as to whether or not an agency will hear a petition for review.
- (6) Sections 740, 750, and 801. Revisions made for consistency with Section 67-5273, Idaho Code.
- (7) Section 790. Revisions made for consistency with Section 67-5270, Idaho Code.
- (8) Section 791. Revisions made for clarity and for consistency with Sections 39-107(6) and 67-5273, Idaho Code.
- (9) Section 860. Revisions made for clarity and for consistency with Section 39-107(6), Idaho Code.

Citizens of the state of Idaho and representatives of regulated industry having an interest in the procedures for obtaining Board review of an action of DEQ may be interested in commenting on this proposed rule. The proposed rule text is in legislative format. Language the agency proposes to add is underlined. Language the agency proposes to delete is struck out. It is these additions and deletions to which public comment should be addressed.

After consideration of public comments, DEQ intends to present the final proposal to the Board of Environmental Quality in the spring of 2010 for adoption as a pending rule. The pending rule is expected to be final and effective upon the adjournment of the 2011 legislative session if adopted by the Board and approved by the Legislature.

NEGOTIATED RULEMAKING: The text of the rule has been drafted based on discussions held and concerns raised during negotiations conducted pursuant to Idaho Code Section 67-5220 and IDAPA 58.01.23.810-815. On September 2, 2009, the Notice of Negotiated Rulemaking was published in the Idaho Administrative Bulletin, Vol. 09-9, pages 336 and 337, and a preliminary draft rule was made available for public review. One meeting was held on September 23, 2009. Members of the public participated in this negotiated rulemaking process by attending the meeting.

IDAHO CODE SECTION 39-107D STATEMENT: This rule does regulate an activity not regulated by the federal government. The federal government does not regulate administrative procedures for the state of Idaho; therefore, the

proposed rule revisions are not broader in scope or more stringent than federal law or regulations.

FISCAL IMPACT STATEMENT: The following is a specific description, if applicable, of any negative fiscal impact on the state general fund greater than ten thousand dollars (\$10,000) during the fiscal year: not applicable.

ASSISTANCE ON TECHNICAL QUESTIONS AND SUBMISSION OF WRITTEN COMMENTS: For assistance on technical questions concerning this rulemaking, contact Paula Wilson at paula.wilson@deq.idaho.gov, (208)373-0418.

Anyone may submit written comments by mail, fax or e-mail at the address below regarding this proposed rule. DEQ will consider all written comments received by the undersigned on or before December 30, 2009.

DATED this 20th day of October, 2009.

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THE FOLLOWING IS THE PROPOSED TEXT FOR DOCKET NO. 58-0123-0901

052. PETITIONS FOR DECLARATORY RULINGS TO BE DECIDED BY ORDER.

01. Final Agency Action. The Board's decision on a petition for declaratory ruling on the applicability of any statute, rule or order administered by the Department is a declaratory ruling and a final agency action within the meaning of Section 67-5255, Idaho Code. (3-15-02)

02. Content. The Board's order issuing the declaratory ruling shall contain or must be accompanied by a document containing the following paragraphs or substantially similar paragraphs: (3-15-02)

a. This is a final agency action issuing a declaratory ruling. (3-15-02)

b. Pursuant to Sections 67-5270 and 67-5272, Idaho Code, any person aggrieved by this declaratory ruling may appeal to district court by filing a petition for judicial review in the District Court in the county in which: ~~(3-15-02)~~()

i. A hearing was held; (3-15-02)

ii. The declaratory ruling was issued; (3-15-02)

iii. The party ~~appealing~~ seeking review resides, or operates its principal place of business in Idaho; or ~~(3-15-02)~~()

iv. The real property or personal property that was the subject of the declaratory ruling is located. (3-15-02)

c. ~~This appeal~~ The petition for judicial review must be filed within twenty-eight (28) days of the service date of issuance of the declaratory ruling. See Section 67-5273, Idaho Code. (3-15-02)(____)

(BREAK IN CONTINUITY OF SECTIONS)

303. DEFECTIVE, INSUFFICIENT OR UNTIMELY PLEADINGS.

Defective, insufficient or untimely pleadings shall not be considered unless the presiding officer determines otherwise that good cause exists, but the presiding officer shall not consider a petition that is filed outside the time limit set forth in Section 100 unless all parties agree to the tolling of the time limit. (3-15-02)(____)

(BREAK IN CONTINUITY OF SECTIONS)

354. ~~ORDERS GRANTING INTERVENTION~~—OBJECTIONS TO PETITIONS TO INTERVENE.

Any party opposing a petition to intervene, must file the objection within seven (7) days after receipt of the petition to intervene and serve the objection upon all parties of record and upon the person petitioning to intervene. Responses shall be filed within seven (7) days after service of the objection. (3-20-04)(____)

354. GRANTING PETITIONS TO INTERVENE.

01. General. If a petition to intervene shows direct and substantial interest in any part of the subject matter of a proceeding, does not unduly broaden the issues, and will not cause delay or prejudice to the parties, the presiding officer may grant intervention, subject to reasonable conditions. In addition, upon timely filing of a petition in accordance with Subsection 352.02, a permit applicant or permit holder may intervene as a matter of right in any contested case in which the permit is contested. (3-15-02)(____)

02. Intervenor Response. Within fourteen (14) days of the date of issuance of the order granting the petition to intervene, the intervenor shall file a response to the petition initiating the contested case. The response shall be in the form and content set out in Subsection 212.02. (____)

355. REVIEW OF ORDERS GRANTING OR DENYING INTERVENTION.

Any party may petition the Board to review an order granting or denying intervention. Petitions for review shall be filed within fourteen (14) days after service of the date of issuance of the order. Responses shall be filed within fourteen (14) days after service of the petition for review. The Board may schedule oral argument in the matter before issuing a decision. (3-20-04)(____)

(BREAK IN CONTINUITY OF SECTIONS)

720. RECOMMENDED ORDERS.

01. Definition. Recommended orders are orders issued by the presiding officer that will become a final order of the Board only after review by the Board pursuant to Section 67-5244, Idaho Code. (3-15-02)

02. Content. Every recommended order must include a schedule for review of the order by the Board and must contain or be accompanied by a document containing the following paragraphs or substantially similar paragraphs: (3-15-02)(____)

a. This is a recommended order of the presiding officer. It will not become final without action of the Board. (3-15-02)

~~b. Within twenty one (21) days after the service date of this recommended order, any party may in writing support or take exceptions to any part of this recommended order and file briefs in support of the party's position on any issue in the proceeding.~~ (3-15-02)

~~eb. Written briefs in support of or taking exceptions to the recommended order shall be filed with the hearing coordinator. Opposing parties shall have twenty one (21) days to respond.~~ The Board shall allow all parties an opportunity to file briefs in support or taking exceptions to the recommended order and may schedule oral argument in the matter before issuing a final order. The hearing coordinator shall issue a notice setting out the briefing schedule and date and time for oral argument. The Board will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived or extended by the parties or for good cause shown. The Board may hold additional hearings or may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. (3-15-02)()

03. No Motions for Reconsideration. Motions for reconsideration of any recommended order shall not be considered. (3-15-02)

721. -- 729. (RESERVED).

730. PRELIMINARY ORDERS.

01. Definition. Preliminary orders are orders issued by the presiding officer that will become a final order of the Board unless reviewed by the Board pursuant to Section 67-5245, Idaho Code. (3-15-02)

02. Content. Every preliminary order must contain or be accompanied by a document containing the following paragraphs or substantially similar paragraphs: (3-15-02)

a. This is a preliminary order of the presiding officer. It can and will become final without further action of the Board unless any party appeals to the Board by filing with the hearing coordinator a petition for review of the preliminary order; (3-15-02)()

b. Within fourteen (14) days ~~after the service of the~~ date of issuance of this preliminary order, any party may ~~appeal to the Board take exceptions to any part of this preliminary order by filing with the hearing coordinator a petition for review of the preliminary order or exceptions to any part of the preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Board.~~ Otherwise, this preliminary order will become a final order of the Board. The basis for review must be stated in the petition. The Board may review the preliminary order on its own motion. (3-15-02)()

c. If any party ~~appeals or takes exceptions to this~~ files a petition for review of the preliminary order, ~~opposing parties shall have twenty one (21) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the hearing coordinator. The Board may review the preliminary order on its own motion.~~ (3-15-02)

d. ~~If the Board grants a petition to review the preliminary order,~~ the Board shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. The hearing coordinator shall issue a notice setting out the briefing schedule and date and time for oral argument. The Board will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived or extended by the parties or for good cause shown. The Board may hold additional hearings or may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. (3-15-02)()

ed. Pursuant to Sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition for judicial review in the district court of the county in which: (3-15-02)()

i. A hearing was held, (3-15-02)

- ii. The final agency action was taken, (3-15-02)
- iii. The party seeking review of the order resides, or operates its principal place of business in Idaho, or (3-15-02)
- iv. The real property or personal property that was the subject of the agency action is located. (3-15-02)

~~fe.~~ ~~This appeal~~ The petition for judicial review must be filed within twenty-eight (28) days of this preliminary order becoming final. See Section 67-5273, Idaho Code. The filing of ~~an appeal to~~ a petition for judicial review in district court does not itself stay the effectiveness or enforcement of the order under ~~appeal~~ review.
(3-15-02)()

03. No Motions for Reconsideration. Motions for reconsideration of any preliminary order shall not be considered. (3-15-02)

731. -- 739. (RESERVED).

740. FINAL ORDERS.

01. Definition. Final orders are preliminary orders that have become final under Section 730 pursuant to Section 67-5245, Idaho Code, or orders issued by the Board pursuant to Section 67-5246, Idaho Code. An order shall be considered a final order pursuant to Section 67-5246, Idaho Code, if issued after a decision by the number of Board members necessary to constitute a quorum. Emergency orders issued under Section 67-5247, Idaho Code, shall be designated as final orders if the Board will not issue further orders or conduct further proceedings in the matter. (3-15-02)

02. Content. Every final order issued by the Board must contain or be accompanied by a document containing the following paragraphs or substantially similar paragraphs: (3-15-02)

a. This is a final order of the Board. (3-15-02)

b. Pursuant to Sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by this final order or orders previously issued in this case may appeal this final order and all previously issued orders in this case to district court by filing a petition for judicial review in the district court of the county in which: (3-15-02)()

- i. A hearing was held; (3-15-02)
- ii. The final agency action was taken; (3-15-02)
- iii. The party seeking review of the order resides, or operates its principal place of business in Idaho; or (3-15-02)
- iv. The real property or personal property that was the subject of the agency action is located. (3-15-02)

c. ~~An appeal~~ The petition for judicial review must be filed within twenty-eight (28) days of the ~~service~~ date of issuance of this final order. See Section 67-5273, Idaho Code. The filing of ~~an appeal to~~ a petition for judicial review in district court does not itself stay the effectiveness or enforcement of the order under ~~appeal~~ review.
(3-15-02)()

03. No Motions for Reconsideration. Motions for reconsideration of any final order shall not be considered. (3-15-02)

741. -- 749. (RESERVED).

750. ORDER NOT DESIGNATED.

If an order is not designated as recommended, preliminary or final at its ~~release~~ issuance, but is designated as recommended, preliminary or final after its ~~release~~ issuance, its ~~effective~~ issuance date for purposes of ~~appeal~~ judicial review is the date of the issuance of the order of designation. If a party believes that an order not designated as a recommended order, preliminary order or final order according to the terms of these rules should be designated as a recommended order, preliminary order or final order, the party may move to designate the order as recommended, preliminary or final, as appropriate. (3-15-02)(____)

(BREAK IN CONTINUITY OF SECTIONS)

790. ~~PERSONS WHO MAY APPEAL~~ RIGHT OF JUDICIAL REVIEW.

Pursuant to Section 67-5270, Idaho Code, any person aggrieved by a final order of the Board in a contested case ~~may appeal to district court~~ is entitled to judicial review. Pursuant to Section 67-5271, Idaho Code, a person is not entitled to judicial review of an agency action in district court until that person has exhausted all administrative remedies available with the Board, but a preliminary, procedural, or intermediate agency action or ruling is immediately reviewable in district court if administrative review of the final agency action would not provide an adequate remedy. (3-15-02)(____)

791. ~~NOTICE OF APPEAL~~ PETITION FOR JUDICIAL REVIEW.

~~The notice of appeal must be filed with the hearing coordinator as set out in Section 008 and with the district court and served on all parties.~~ (3-15-02)

01. Filing ~~Appeal~~ and Service. The petition for judicial review must be filed with the hearing coordinator as set out in Section 008 and with the district court and served on all parties. Pursuant to Section 39-107(6), Idaho Code, the petition for judicial review shall also be served upon the Chairman of the Board, the Director of the Department, and upon the Attorney General of the State of Idaho. Pursuant to Section 67-5272, Idaho Code, ~~appeals~~ petitions for judicial review may be filed in the District Court of the county in which: (3-15-02)(____)

- a. The hearing was held; (3-15-02)
- b. The final agency action was taken; (3-15-02)
- c. The party seeking review of the agency action resides; or (3-15-02)
- d. The real property or personal property that was the subject of the agency action is located. (3-15-02)

02. Filing Deadline. Pursuant to Section 67-5273, Idaho Code, a petition for judicial review of a final order in a contested case must be filed within twenty-eight (28) days of the ~~service~~ date of issuance of the final order. (3-15-02)(____)

(BREAK IN CONTINUITY OF SECTIONS)

801. BOARD RESPONSE TO PETITION.

01. Action of Board. The Board shall have until the first regularly scheduled meeting that takes place fourteen (14) or more days after submission of the petition to initiate rulemaking proceedings in accordance with Sections 67-5220 through 67-5225, Idaho Code, and these rules or deny the petition in writing, stating its reasons for the denial. (3-15-02)

02. Denial. If the petition is denied, the written denial shall state: (3-15-02)

a. The Board has denied your petition to initiate rulemaking. This denial is a final agency action within the meaning of Section 67-5230, Idaho Code. (3-15-02)

b. Pursuant to Section 67-5270, Idaho Code, any person aggrieved by this final agency action may seek review of the denial to initiate rulemaking by filing a petition for judicial review in the District Court of the county in which: (3-15-02)(____)

i. The hearing was held; (3-15-02)

ii. This final agency action was taken; (3-15-02)

iii. The party seeking review resides, or operates its principal place of business in Idaho; or (3-15-02)

iv. The real property or personal property that was the subject of the denial of the petition for rulemaking is located. (3-15-02)

c. ~~This appeal~~ The petition for judicial review must be filed within twenty-eight (28) days of the ~~service~~ date of issuance of this denial of the petition to initiate rulemaking. (3-15-02)(____)

(BREAK IN CONTINUITY OF SECTIONS)

860. ~~PERSONS WHO MAY SEEK~~ PETITION FOR JUDICIAL REVIEW OF AN ADMINISTRATIVE RULE OF THE DEPARTMENT.

Pursuant to Section 67-5270, Idaho Code, any person aggrieved by an administrative rule of the Department (either temporary or final) may seek judicial review in district court. (3-15-02)(____)

01. Filing and Service. The petition for judicial review must be filed with the hearing coordinator as set out in Section 008 and with the district court and served on all parties. Pursuant to Section 39-107(6), Idaho Code, the petition for judicial review shall also be served upon the Chairman of the Board, the Director of the Department, and upon the Attorney General of the State of Idaho. Pursuant to Section 67-5272, Idaho Code, petitions for review may be filed in the District Court of the county in which: (3-15-02)(____)

a. The hearing was held; (3-15-02)

b. The final agency action was taken; (3-15-02)

c. The party seeking review of the agency action resides, or operates its principal place of business in Idaho; or (3-15-02)

d. The real property or personal property that was the subject of the agency action is located. (3-15-02)

02. Time. Pursuant to Section 67-5273, Idaho Code, a petition for judicial review of a final rule (except for a challenge to procedures used in promulgating the rule) may be filed at any time. (3-15-02)